United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original

76-1285

To be argued by
EDWARD R. KORMAN

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1285

UNITED STATES OF AMERICA,

Appellee,

—against—

MICHAEL JOURNET,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

DAVID G. TRAGER,
United States Attorney,
Eastern District of New York.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases

Statutes and Rules

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Preliminary Statement

The appellant, Michael Journet, appeals from a judgment entered in the United States District Court for the Eastern District of New York (Costantino, *J.*), upon his plea of guilty, convicting him of intentionally distributing a Schedule I narcotic drug in violation of Title 21, United States Code, § 841(a)(1), and sentencing him to a term of imprisonment of eight years with a special parole term of seven years.

Statement of Facts

On April 5, 1976, the appellant, Michael Journet, having been charged in a two count indictment with conspiracy to distribute narcotics, and with distributing

narcotics, in violation of Title 21, United States Code, § 841(a)(1), asked to withdraw his plea of not guilty to the second count of the indictment which charged him with distributing a Schedule I narcotic drug.

The defendant, who was represented by a Legal Aid Society Attorney, was personally addressed by Judge Costantino. After being asked his age (Tr. 3), the defendant told Judge Costantino that he was pleading guilty to Count 2, which he understood to be "a felony, a major crime." Judge Costantino then addressed the defendant, as follows (Tr. 4):

> "The Court: Well, in order for the Court to accept a plea of guilty, you must waive certain constitutional rights. And the first of which is the right to a jury trial.
>
> Now, a jury trial, of course, places people in the box there and they hear the case and then they would make a determination as to whether or not you are guilty or innocent after hearing the entire case.
>
> Do you waive that right?
>
> The Defendant: Yes.
>
> The Court: The second right is the right of confrontation of witnesses. And that means that the people who know about what they say you have done wrong would come to court and testify. And then your lawyer would have a right to cross-examine them to determine whether or not they are being truthful in what they say you have done.
>
> Do you waive that?
>
> The Defendant: Yes.

The Court: All right, you are pleading guilty to Count 2. Now, you can't be guilty and innocent. Therefore, you are waiving a right under the law as to a presumption of innocence. That means that no longer you can be presumed innocent, but you are guilty of Count 2 of this indictment; is that right, sir?

The Defendant: Yes, sir.

The Court: You know you are waiving that right?

The Defendant: Yes.

The Court: Of being innocent.

The Defendant: Yes."

After this colloquy, Judge Costantino then addressed the defendant to determine whether any promises had been made, other than that Count I of the indictment would be dismissed, and determined that the plea was voluntary (Tr. 6-7):

"The Court: * * * You know what I mean by 'forced'? Did someone walk up to you, your lawyer or anybody, and say, 'You'd better plead guilty or else you might get fifteen years,' or make any kind of statement to you? Did anybody do that to you?

The Defendant: No.

The Court: Are you sure of that now?

The Defendant: Yes.

The Court: Anyone cause you any duress? That means, again, try to influence you so that you would not stand trial and you would plead guilty?

The Defendant: No.

The Court: For any reason whatsoever?

The Defendant: No."

Judge Costantino then asked the defendant to tell him in his own words what he had done (Tr. 7-8):

"The Court: Now, tell me in your own words what you say that you have done wrong in reference to this Count 2 of this indictment.

The Defendant: Johnny Moustache came to the boutique on Court St. where I gave him some small amount of cocaine.

Mr. Clayman: Johnny Moustache is an individual who is an undercover agent.

The Court: All right. That small amount, how much was that?

The Witness: Half-ounce. At the time that you gave him, or whatever you did with the cocaine, did you intend, No. 1, to give it to him to distribute? Did you intend to do that?

The Defendant: Yes.

The Court: Did you knowingly distribute it to this agent?

The Defendant: Yes.

The Court: Did you know by doing that, that you would be in violation of law?

The Defendant: Yes.

The Court: You knew it was wrong to do it?

The Defendant: Yes.

Finally, the District Court advised the defendant of the penalty provided by Title 21, United States Code, § 841(a)(1) for the offense (Tr. 9-10):

> "The Court: I now advise you that under the Section that you have pleaded guilty to, which is Section 841(a)(1) of the United States Code, that the maximum penalty is fifteen years and/or $25,000 fine, with a minimum of three years special parole term. You can receive all three of those. And the Court must impose upon you on the date of sentence a minimum of three years special parole term if you receive a jail sentence. Do you understand that?
>
> The Defendant: Yes.
>
> The Court: Now, special parole term means that in the event you should get involved in another matter or similar matter, that you could go to jail for the additional time with which this Court has assessed you to a special parole term. You understand that?
>
> The Defendant: Yes.
>
> The Court: Is there anything you don't understand about the sentence?
>
> The Defendant: No."

ARGUMENT

The defects in the plea proceedings were not such as to deprive the defendant of any substantial right. F.R.Crim.P., Rule 52(a), mandates that they shall be disregarded.

The plea taking procedure followed by the District Court plainly satisfied the stringent due process standards set out by the Supreme Court for insuring that a plea of guilty is knowingly and voluntarily entered. The appellant does not argue otherwise, nor could he on the basis of this record. See *Kloner* v. *United States*, 535 F.2d 730, 733 (2d Cir. 1976); *United States* v. *Michel*, 507 F.2d 461 (2d Cir. 1974). The defendant, however, argues that a plea which has been knowingly and voluntarily entered must be set aside on appeal because in five respects it failed to comply with the newly formulated procedures prescribed by Rule 11. The defendant claims that he was not told (1) that, if he did not plead guilty and chose to go to trial, he would have the right not to be compelled to incriminate himself, (2) that he had the right to the assistance of counsel at trial, (3) that if he pleaded guilty there could be no further trial of any kind, (4) that he could be asked questions under oath and "if he answers these questions under oath, on the record, and in the presence of counsel, his answers may be used against him in a prosecution for perjury or false statement," and (5) that the district court failed to advise him in *haec verba* that a three year mandatory minimum special parole term could be indeterminate.

We submit that the alleged failure to comply with the procedures of Rule 11 are not such as to deprive the defendant of his substantial right to enter a knowing

and voluntary plea of guilty. The holding in *McCarthy* v. *United States*, 394 U.S. 459 (1969), which mandated an order setting aside a guilty plea where Rule 11 had not been complied with, dealt with a prior version of Rule 11 which prescribed the minimum standards necessary to insure that a plea of guilty was knowingly and voluntarily entered. A violation of former Rule 11 left substantial doubt as to whether a knowing and voluntary plea had been entered. Rule 11, as recently amended, goes well beyond the minimum requirements necessary to insure that a plea is knowingly and voluntarily entered. Under these circumstances, we do not believe that this Court is free to ignore Rule 52(a), which has the same force and effect as Rule 11, and which provides that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." In an analogous context, dealing with the effect of non-constitutional errors in complying with the procedures set out in Rule 41 for obtaining search warrants, this Court has applied Rule 52(a) and held that not every failure to comply with Rule 41 warranted the invocation of the exclusionary rule. *United States* v. *Ravitch*, 421 F.2d 1196, 1201-02 (2d Cir. 1970), certiorari denied, 400 U.S. 834 (1970); *United States* v. *Burke*, 517 F.2d 377, 386 (2d Cir. 1975). On the contrary, the exclusionary rule would *not* be applied unless "(1) there was 'prejudice' in the sense that the search might not have occurred or would not have been so abrasive if the Rule had been followed, or (2) there was evidence of intentional and deliberate disregard of a provision in the Rule."

Although somewhat different interests are at stake in the present context, we believe that the test formulated in *Burke* is adaptable in determining when the harmless rule mandated by Rule 52(a) shall be applied here.

Since the purpose of Rule 11 is to insure that the defendant makes a voluntary and informed plea of guilty, the plea should not be set aside unless the defects were so substantial that it cannot be said from the record that the plea was made knowingly and voluntary.

We do not believe that the defects here remotely approach that standard. Indeed, we do not believe that there were five "defects" which can be described as a material violation of Rule 11. So, for example, since Judge Costantino follows the policy of the district court judges in the Eastern District of New York, which does not normally require the defendant to make responses under oath, the failure to advise the defendant that, if his plea was under oath, the statements he made would be used against him in a prosecution for perjury or making a false statement, hardly constitutes a material violation of Rule 11. Similarly, having been told that the plea constituted a waiver of his right to a jury trial and destroyed the presumption of innocence and "means that you are guilty of Count 2 of this indictment" (Tr. 5), it could hardly be suggested that the defendant entertained any serious notion that "some kind of trial will follow"[1] to determine his guilt or innocence. Accordingly, it is submitted that the advice regarding the waiver of a jury trial, combined with the instruction as to "destruction of the presumption of innocence," amply satisfied the purpose of the requirement of Rule 11(c)(4) which requires that a defendant be advised that, after his plea, "there will not be a further trial of any kind."

Moreover, the defendant, who was represented by assigned counsel from the beginning, and was advised

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[1] Advisory Committee Notes to Rule 11, 18 U.S.C.A. at 22 (1975).

during the plea that, at trial "your lawyer would have a right to cross-examine" witnesses (Tr. 5), could hardly have entertained any doubt that at the trial which he was waiving, he would have the right to a lawyer. Similarly, the failure to expressly warn him of this right or the fact that he would not be compelled to testify at the trial he was waiving, does not cast substantial doubt on whether the plea was made knowingly and voluntarily. Nor is it likely that the defendant would not have plead had he received this additional advice. It is for this reason that such warnings of trial rights are not held to be constitutionally mandated. *United States* v. *Kioner*, *supra*, 535 F.2d at 733.

The final claimed defect we believe is likewise harmless. The defendant was advised that he could receive a maximum sentence of fifteen years in prison and a minimum parole term of three years, and, of course, the sentence he received was far less than that, since it was eight years in prison and a special parole term of seven years. Assuming, *arguendo*, that the District Court was required to state in *haec verba* what the advice implied, that the special parole could exceed three years, the mandatory parole term, as Mr. Justice Stevens has observed, "though a matter of importance, is a comparatively minor factor when considered in connection with the judge's advice to the defendant that he might be imprisoned for as long as fifteen years." The absence of such advice "did not make the advice which was given materially misleading; accordingly the plea was voluntary." Moreover, Justice Stevens observed, on the issue whether the absence of the advice rendered the plea fundamentally unfair, "the advice should be compared with the actual sentence rather than with a correct statement of the sentence that might properly have been imposed. As long as the actual sentence was less than the maximum as described in the judge's advice, *I would find no unfairness*—and certainly not any unfairness sufficiently

grave to qualify as constitutional error."[2] *Bachner* v. *United States*, 517 F.2d 589, 599 (7th Cir. 1975) (emphasis supplied), concurring op. Steven, J.

CONCLUSION

We recognize that the arguments made here may fall on unsympathetic ears, largely because compliance with F.R. Crim. P., Rule 11 should be relatively easy for any careful district court judge. Nevertheless a decision to permit a defendant, who is simply dissatisfied with his sentence, to set aside his conviction almost six months after his plea, permits what is little more than perversion of Rule 11 to confer a benefit which its framers never intended.[3] It simply constitutes "sanctioning the playing of games" by guilty defendants. Cf. *United States* v. *Salzmann*, — F.2d —, No. 76-1357, decided September 28, 1976 (concurring opinion of Feinberg, *J.*). Accordingly we ask that the judgment of conviction be affirmed.

Dated: September 29, 1976.

Respectfully submitted,

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Chief Assistant United States Attorney.

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[2] Justice Stevens was speaking in the context of a Section 2255 proceeding in which he viewed it essential for the defendant to establish a Due Process violation. On the other hand, his remarks were in the context of a case in which *no* advice whatever was given with regard to the minimum special parole term, and we believe that his analysis has considerable bearing on whether the alleged defect here was harmless.

[3] On June 4, 1976, some two months after the plea of guilty was entered, the appellant appeared for sentencing. At that time his attorney stated that there was "no legal cause" why sentence should not be imposed (Tr. 3). Seven days later a notice of appeal was filed.

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